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No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

UKIAH ADVENTIST HOSPITAL, a California not-for-profit corporation, now known as UKIAH VALLEY MEDICAL CENTER, and ADVENTIST HEALTH SYSTEM/WEST, a California not-for-profit corporation,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Does the statutory grant of exclusive jurisdiction to the courts of appeals to review Federal Trade Commission cease and desist orders oust the district courts of their federal question jurisdiction to scrutinize and restrain *ultra vires* actions by administrative agencies, as the court of appeals held in this case?

2. Does the Federal Trade Commission have authority to proceed under Section 7 of the Clayton Act against an assets acquisition by a not-for-profit hospital?

3. Can the court of appeals refuse to consider an appeal from an order denying a motion for a preliminary injunction?

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No.

IN THE
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UKIAH ADVENTIST HOSPITAL, a California not-for-profit corporation, now known as UKIAH VALLEY MEDICAL CENTER, and ADVENTIST HEALTH SYSTEM/WEST, a California not-for-profit corporation,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Ukiah Adventist Hospital, now known as Ukiah Valley Medical Center, and Adventist Health System/West (collectively "Ukiah"),[1] seek a writ of certiorari to review an opinion and order of the United States Court of Appeals for the District of Columbia Circuit dismissing in part Ukiah's appeal and transferring the original preliminary injunction action to the United States Court of Appeals for the Ninth Circuit.

[1] Pursuant to Rule 29.1, Adventist Health System/West is the parent company of Ukiah Adventist Hospital, now known as Ukiah Valley Medical Center, and Adventist Health System/Loma Linda. There are no other parent companies or non-wholly owned subsidiaries of any of the petitioners. All of the parties in the courts below and in this Court are named in the caption.

OPINIONS BELOW

The December 29, 1992 opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 981 F.2d 543, and is reprinted at Appendix A. The D.C. Circuit's March 23, 1993 order denying Ukiah's petition for rehearing is reprinted at Appendix B. The October 17, 1991 opinion of the United States District Court for the District of Columbia denying Ukiah's motion for a preliminary injunction and transferring the case to the United States Court of Appeals for the Ninth Circuit is reported at 1991-2 Trade Cas. (CCH) ¶ 69,620, and is reprinted at Appendix C.

The February 8, 1989 order of Administrative Law Judge Lewis F. Parker dismissing in part the administrative complaint on the ground that the Federal Trade Commission ("FTC") has no jurisdiction over a pure assets acquisition by a not-for-profit entity is reprinted at Appendix D. Judge Parker's Initial Decision of August 2, 1990, dismissing the administrative complaint for lack of jurisdiction, is reprinted at Appendix E. The August 2, 1991 order and opinion of the Federal Trade Commission reversing Judge Parker's Initial Decision is reprinted at Appendix F.

The January 30, 1990 order of the United States District Court for the Northern District of California denying Ukiah's motion for preliminary injunction is reported at 1990-1 Trade Cas. (CCH) ¶ 68,916, and is reprinted at Appendix G. The August 13, 1990 opinion of the Ninth Circuit Court of Appeals affirming the district court's order is reported at 911 F.2d 261, and is reprinted at Appendix H.

Judge Parker's December 9, 1992 decision in favor of Ukiah after full trial on the merits is reprinted at Appendix I. The Commission's April 16, 1993 order denying Ukiah's request for a stay of further FTC proceedings pending Ukiah's possible filing of a petition for a writ of certiorari to the D.C. Circuit is reprinted at Appendix J.

JURISDICTION

The court of appeals issued its opinion on December 29, 1992. (App. A.)[2] On March 23, 1993, the court of appeals entered an order denying Ukiah's timely petition for rehearing and suggestion for rehearing *en banc*. (App. B.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).[3]

STATUTES INVOLVED

28 U.S.C. § 1292(a)(1) (1988) provides:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

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[2] References to the opinions and orders reprinted in the Appendix appear throughout the petition as "App.", followed by the relevant appendix page designations.

[3] On April 7, 1993, the Clerk of the D.C. Circuit transmitted, in lieu of a mandate, a copy of the court's opinion and its judgment to the Clerk of the District Court. The Clerk of the District Court transferred the case to the Ninth Circuit Court of Appeals. The case was docketed in the Ninth Circuit on April 22, 1993, and on June 2, 1993, Ukiah filed a motion to stay the proceedings in the Ninth Circuit pending the outcome of this Petition for Writ of Certiorari. The motion to stay is now pending in the Ninth Circuit.

28 U.S.C. § 1331 (1988) states:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1651(a) (1988) provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44 (1988), states:

> "Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

Section 7 of the Clayton Act, 15 U.S.C. § 18 (1988), provides:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of

> commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 11 of the Clayton Act, 15 U.S.C. § 21 (1988), provides in relevant part:

> (c) Review of orders; jurisdiction; filing of petition and record of proceeding; conclusiveness of findings; additional evidence; modifiction of findings; finality of judgment and decree
>
> Any person required by such order of the commission, board, or Secretary to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission, board, or Secretary be set aside . . . .
>
> (d) Exclusive jurisdiction of Court of Appeals
>
> Upon the filing of the record with its [sic] the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission, board, or Secretary shall be exclusive.

STATEMENT OF THE CASE

This case arises from Ukiah's action in the United States District Court for the District of Columbia to enjoin the FTC from proceeding with its administrative challenge to the acquisition of assets by a small not-for-profit hospital in Ukiah, California. Ukiah seeks review by writ of certiorari of the D.C. Circuit's holding that the statutory grant of exclusive jurisdiction to the courts of appeals to review FTC cease and desist orders ousts the district courts of their federal question jurisdiction to scrutinize and restrain *ultra vires* agency actions. Based upon its own prior opinion in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 74-79 (D.C. Cir. 1984) ("*TRAC*"), the court of appeals reasoned that *all* challenges to an agency's jurisdiction prior to a cease and desist order lie within the exclusive jurisdiction of the courts of appeals, and therefore transferred Ukiah's action for injunctive relief to the Ninth Circuit. In reaching this result, the D.C. Circuit has extended the exclusive jurisdiction of the courts of appeals to review cease and desist orders well beyond the language of the statutory grant of Section 11 of the Clayton Act. In so doing, the court of appeals has rendered an opinion that significantly curtails the district courts' federal question jurisdiction, contrary to longstanding interpretations of 28 U.S.C. §§ 1331 and 1337 (1988), and contrary to this Court's prior decisions and the decisions of other circuits acknowledging the authority of the district courts to curb administrative excesses.

In August 1988, Ukiah Adventist Hospital, now known as Ukiah Valley Medical Center ("Ukiah Valley"), a California not-for-profit corporation, acquired substantially all of the assets of Ukiah Hospital Corporation, doing business as Ukiah General Hospital ("Ukiah General"), a California business corporation, in a non-stock transaction. (App. a-3; e-6.)

Prior to the acquisition, there were three small acute-care hospitals in Ukiah, California, a rural community of approximately 13,600 people located 100 miles north of San Francisco. (App. i-

5-6.) Ukiah Valley had 43 beds; Ukiah General had 51 beds; and Mendocino Community Hospital had 56 beds. (App. i-5.) Together, Ukiah Valley and Ukiah General had a total capacity of 94 beds, and each hospital had an average occupancy of only 26 patients per day. *Id.* The total census for all three hospitals combined averaged about 60 patients per day during 1988. *Id.*

The FTC initially asserted regulatory jurisdiction over the transaction by commencing an investigation in August 1988, shortly after Ukiah had concluded the transaction.[4] (App. g-2.) The FTC issued an administrative complaint on November 7, 1989, charging Ukiah with violating Section 7 of the Clayton Act, 15 U.S.C. § 18. (App. e-1; g-2.) On January 19, 1990, Ukiah filed its motion to dismiss the administrative complaint, based in part upon the FTC's lack of jurisdiction over an assets acquisition by a not-for-profit entity. Ukiah pointed out that the assets acquisition clause of Section 7, 15 U.S.C. § 18, requires that the acquiring person be "subject to the jurisdiction of the Federal Trade Commission," and that not-for-profits are not subject to the jurisdiction of the FTC. 15 U.S.C. § 44. (App. d-1-2; e-1-2.)

On February 8, 1990, Administrative Law Judge Lewis F. Parker granted, in part, Ukiah's motion to dismiss. (App. D.) Judge Parker concluded that pure assets acquisitions by entities not subject to the jurisdiction of the FTC, such as not-for-profits, were excluded from the reach of Section 7. (App. d-8.) On August 2, 1990, Judge Parker issued his Initial Decision dismissing the administrative complaint in its entirety. (App. E.) Judge Parker reaffirmed his February order, holding that the FTC does not have Clayton Act jurisdiction over assets acquisitions by not-for-profit entities, and that the Ukiah transaction was outside the scope of the FTC's jurisdiction. (App. e-8-9.)

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[4] Ukiah was not required to file a pre-merger notification under the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a (1988), because the $6 million purchase price was well below the monetary threshold for such filings.

One year later, on August 2, 1991, the full Commission reversed Judge Parker. (App. F.) The Commission decided that it had jurisdiction over assets acquisitions by not-for-profits, including the Ukiah transaction. (App. f-41.)

With this final FTC action on the question of the agency's own jurisdiction, after three years of proceedings before the FTC, on September 12, 1991, Ukiah brought a separate action in the District Court for the District of Columbia seeking injunctive and declaratory relief. (App. c-1.)[5] Ukiah alleged jurisdiction in the District Court based upon 28 U.S.C. §§ 1331, 1337 and 1651. Ukiah sought to obtain a prompt judicial ruling on the threshold issue of the FTC's jurisdiction over the Ukiah transaction and to stop the FTC's dubious action, which continued to cause irrepara-

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[5] Ukiah twice previously had tried to obtain judicial resolution of the issue of the FTC's jurisdiction at the pretrial stage, but was unsuccessful due to the lack of final agency action on the question of its own jurisdiction. On February 24, 1989, Ukiah filed a motion to quash the FTC's initial subpoena *duces tecum*, issued on February 3, 1989, on the ground that the FTC lacked jurisdiction under Section 7 of the Clayton Act. (App. g-2.) The full Commission denied Ukiah's motion on April 10, 1989. *Id.* Based upon its earlier assertion that the FTC lacked jurisdiction, Ukiah refused to comply with the subpoena. Because the FTC did not attempt to enforce the subpoena in federal court, Ukiah was unable to obtain judicial determination of the question of the FTC's jurisdiction at that time. On December 19, 1989, Ukiah filed an action in the District Court for the Northern District of California seeking a declaration that the FTC has no jurisdiction over the acquisition and an injunction against the FTC's proceeding. (App. G.) On December 20, 1989, the district court denied Ukiah's application for emergency relief, and on January 30, 1990, the court denied Ukiah's motion for a preliminary injunction and dismissed the action. *Id.* The court held that the issuance of the administrative complaint by the FTC was not final agency action and, therefore, the district court had no jurisdiction to review the FTC's action or to consider the issue of the FTC's jurisdiction. (App. g-4.) On August 13, 1990, the Ninth Circuit affirmed. (App. H.) The court of appeals also held that the absence of final agency action precluded judicial review. *Id.* Neither the court of appeals nor the district court reached the substantive question of the FTC's jurisdiction over the Ukiah transaction.

ble injury to this small rural hospital.[6] On October 17, 1991, the district court, stating that it was "sympathetic to plaintiffs' position," held that it lacked jurisdiction over the merits of the controversy based upon the D.C. Circuit's prior ruling in *TRAC*. (App. c-1.) The district court denied Ukiah's motion for a preliminary injunction and, pursuant to 28 U.S.C. § 1631, transferred the case to the Ninth Circuit Court of Appeals. (App. c-2.)

Ukiah appealed the district court's order to the United States Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 1292(a)(1) and alternatively sought mandamus, pursuant to 28 U.S.C. § 1651, to require the district court to hear the preliminary injunction motion. On December 29, 1992, the court of appeals affirmed. (App. A.) The court of appeals held that the district court properly concluded that it had no jurisdiction to hear the suit. (App. a-10). Relying upon its prior opinion in *TRAC*, the court of appeals held that the Ninth Circuit Court of Appeals has exclusive jurisdiction to hear Ukiah's preliminary injunction action. (App. a-14.) Despite the district court's express denial of Ukiah's preliminary injunction motion (App. c-2), the court of appeals refused to hear Ukiah's appeal under 28 U.S.C. § 1292(a)(1). (App. a-7-8.) The court also held that the order transferring the case to the Ninth Circuit Court of Appeals was not appealable. (App. a-8.) Ukiah timely filed a motion for rehearing and suggestion for rehearing *en banc*, and on March 23, 1993, the court of appeals denied Ukiah's motion. (App. B.)

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[6] In support of its request for injunctive relief, Ukiah submitted the affidavit of ValGene Devitt, President of Ukiah Valley Medical Center. Mr. Devitt attested to the deleterious impact that the FTC's prosecution has had on Ukiah, including decreased staff salaries, deferral of necessary equipment purchases, loss of crucial philanthropic support and public funding, and impairment of Ukiah's ability to recruit qualified medical staff, all in addition to the enormous litigation costs imposed by the FTC's administrative action. The FTC offered no evidence to the contrary. Harm of this type has been recognized as sufficiently grievous to tip the balance in favor of injunctive relief. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.2 (D.C. Cir. 1977).

Now, after five years of proceedings before the FTC, no court has yet considered the issue of the agency's jurisdiction. The FTC action continues. The administrative action was tried on the merits in July 1992 before Judge Parker. On December 9, 1992, Judge Parker again dismissed the FTC's complaint. (App. I.) Judge Parker concluded that the FTC had failed in its proofs and that the challenged acquisition had not conferred market power on Ukiah and was not likely substantially to lessen competition in the relevant geographic market. (App. i-54.) The FTC appealed Judge Parker's decision, and on April 22, 1993, the full Commission heard oral argument on the appeal.[7]

REASONS FOR GRANTING THE WRIT

Summary of Argument

The opinion of the court of appeals strips the district courts of jurisdiction to enjoin actions by agencies in excess of their statutory powers. The opinion expands the courts of appeals' exclusive jurisdiction to review FTC cease and desist orders, thus barring other courts from entertaining any suit requesting relief that *might* affect the courts of appeals' prospective jurisdiction to review a later cease and desist order. (App. a-10-11.) The D.C. Circuit's opinion disregards the plain language of Section 11 of the Clayton Act granting exclusive jurisdiction to review cease and desist orders to the courts of appeals. The opinion precludes any district court scrutiny of *ultra vires* agency orders or actions pursuant to the district courts' usual federal question jurisdiction. The court of appeals thus assumes the implied repeal of long-acknowledged district court jurisdiction under 28 U.S.C. §§ 1331 and 1337, and directly conflicts with this Court's decision in *Leedom v. Kyne*, 358 U.S. 184 (1958), as well as the decisions of other courts of appeals and the practice of district courts. The

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[7] On April 13, 1993, Ukiah filed a motion with the FTC requesting the agency to stay argument on the FTC's appeal from Judge Parker's ruling in favor of Ukiah. The FTC summarily denied the motion on April 16, 1993. (App. J.)

court of appeals' opinion disrupts the allocation of judicial power between the courts of appeals and the district courts, and effectively precludes all efforts to enjoin administrative actions in excess of delegated powers. This misallocation of judicial power is doubly significant because the D.C. Circuit is the preeminent forum for judicial review of agency action. The opinion is irreconcilable with the Second Circuit's interpretation of the scope of exclusive jurisdiction under Section 11 of the Clayton Act in *PepsiCo, Inc. v. FTC*, 472 F.2d 179 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973), and with the principles of judicial restraint applied by this Court in interpreting statutory grants of jurisdiction. *See McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991).

I.

A. The *TRAC* Doctrine Applied Below Conflicts With Opinions Of The Second Circuit And This Court.

By its plain terms, Section 11 of the Clayton Act, 15 U.S.C. § 21, vests the courts of appeals with exclusive jurisdiction to review cease and desist orders issued by the Commission. Relying upon its earlier opinion in *TRAC*, the court of appeals held that Section 11 strips the district courts of jurisdiction to hear "'any suit seeking relief that might affect the Circuit Court's future jurisdiction.'" (App. a-10.)

The D.C. Circuit's effort to bootstrap the specific jurisdiction of the courts of appeals into a global regime of exclusive appellate review is patently inconsistent with the Second Circuit Court of Appeals' opinion in *PepsiCo, Inc. v. FTC*, 472 F.2d 179 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973).[8] It is also irreconcilable with this Court's opinions in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 491-94 (1991), *K Mart Corp. v.*

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[8] *PepsiCo* involved the question of exclusive appellate jurisdiction under Section 5 of the FTC Act, 15 U.S.C. § 45, which is identical in all relevant parts to Section 11 of the Clayton Act, 15 U.S.C. § 21.

Cartier, Inc., 485 U.S. 176, 190-91 (1988), and *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 589-91 (1980), and with the principles established by this Court for interpreting legislative grants of jurisdiction. *See Bread Political Action Comm. v. Federal Election Comm'n*, 455 U.S. 577, 580 (1982) (holding that judicial power depends upon the Constitution or enabling legislation, and jurisdictional statutes must be construed "with precision and with fidelity to the terms by which Congress has expressed its wishes"); *see also Rubin v. United States*, 449 U.S. 424, 430 (1981) (when terms of a statute are unambiguous, court's inquiry is complete).

Over 20 years ago, Judge Friendly held that the grant of exclusive jurisdiction to the courts of appeals is limited to review of cease and desist orders by the FTC:

> Although the Federal Trade Commission Act limits review by a court of appeals to "any person, partnership, or corporation required by an order of the Commission to cease and desist," we agree with appellants that the fact that the order here assailed is not one requiring PepsiCo to cease and desist from anything does not lead inexorably to the conclusion that it is not reviewable, but only that it is not reviewable by petition to a court of appeals.

PepsiCo, 472 F.2d at 185 (citations omitted); *see also E.I. DuPont de Nemours & Co. v. FTC*, 488 F. Supp. 747, 750 (D. Del. 1980).[9]

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[9] Unlike the posture of the administrative proceeding in *PepsiCo*, the FTC's decision reversing Judge Parker and holding that the FTC has jurisdiction under the Clayton Act over assets acquisitions by not-for-profit entities is final agency action on the issue of the agency's jurisdiction. The FTC's decision is "definitive" and it has a "direct and immediate . . . effect on the day-to-day business" of Ukiah. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 151, 152 (1967). The ruling is an unambiguous pronouncement on a purely legal question. *See Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436-37 (D.C. Cir. 1986); *Atlantic Richfield* (continued...)

In construing exclusive jurisdiction provisions, this Court has looked to the terms of the particular statute in question. For example, in *McNary*, this Court granted certiorari to determine whether Section 210(e) of the Immigration Act, 8 U.S.C. § 1160(e) (1988), precluded district court jurisdiction to hear a constitutional challenge to agency practice. 498 U.S. at 485-89. Section 210(e) provides that the denial of adjustment status by the Immigration and Naturalization Service ("INS") can be reviewed "only in the judicial review of an order of exclusion or deportation under section 1105a of this title." 8 U.S.C. § 1160(e)(3)(A). This Court held that the district court properly had federal question jurisdiction to hear the constitutional challenge, and that the exclusive review provisions of Section 210(e) did not divest the district court of its general federal question jurisdiction. The touchstone for this Court was the language of the exclusive review provision: "[H]ad Congress intended the limited review provisions of § 210(e) of the INA to encompass challenges to INS procedures and practices, it could easily have used broader statutory language." 498 U.S. at 494. In *McNary*, the district court action did not seek "review on the merits of a denial of a particular application." *Id.* Therefore, this Court concluded that "the District Court's general federal-question jurisdiction under 28 U.S.C. § 1331 to hear this action remains unimpaired by § 210(e)." *Id.*; *see also Morris v. Helms*, 681 F.2d 1162, 1163-64 (9th Cir. 1982)

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[9](...continued)
Co. v. Department of Energy, 769 F.2d 771, 782 (D.C. Cir. 1984); *Athlone Indus. Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1489 (D.C. Cir. 1983). The FTC's ruling that Ukiah is not exempt from agency scrutiny under Section 7 has visited irreparable harm on two small rural hospitals that goes well beyond the normal incidents of litigation costs. *See United States v. Cabrini Med. Ctr.*, 639 F.2d 908, 910 (2d Cir. 1981). In its brief in the court of appeals, the FTC did not dispute that Ukiah has exhausted its administrative remedies. *See McKart v. United States*, 395 U.S. 185, 193 (1969); *Rafeedie v. INS*, 880 F.2d 506, 513-15 (D.C. Cir. 1989). The issue of the FTC's jurisdiction is ripe for review. *See Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 813, 816 (D.C. Cir. 1990); *Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 92-93 (D.C. Cir. 1986).

(construing exclusive appellate review provision of Federal Aviation Act in accordance with terms of statute).

In *K Mart*, one of the petitioners contended that the district court's federal question jurisdiction was usurped by 28 U.S.C. § 1581(a), which vests the Court of International Trade with exclusive jurisdiction over "any civil action commenced to contest the denial of a protest." The petitioner admitted that the suit was not a protest, but argued that since the suit included subject matter that may give rise to a protest, the Court of International Trade had exclusive jurisdiction "as a corollary to protest jurisdiction." *K Mart*, 485 U.S. at 190 (quoting Brief for Petitioner). This Court rejected the petitioner's attempt to expand the exclusive jurisdiction of the Court of International Trade, stating that Section 1581(i)(a) "will not bear petitioner's reading." *K Mart*, 485 U.S. at 190. Since the "suit involve[d] no 'protest,' much less a denial of one," the Court held that the district court had jurisdiction to hear the case. *Id.* at 190-91; *see also Harrison*, 446 U.S. at 589 (provision of Clean Air Act that courts of appeals have exclusive jurisdiction over "any other final agency action" "must be construed to mean exactly what it says").

The effect of the D.C. Circuit's expansive interpretation of the courts of appeals' power to review FTC cease and desist orders is to narrow the jurisdiction of the district courts under 28 U.S.C. § 1331. Nowhere in the plain language of Section 11 of the Clayton Act is there any indication that Congress intended to deprive the district courts of their original jurisdiction to review orders issued in the course of an FTC administrative proceeding and to curb administrative excesses. *See American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation.").

In an earlier action to enjoin an FTC proceeding, Judge Hogan of the D.C. District Court rejected the FTC's proffered expansive interpretation of *TRAC*:

> It would strain credulity to deduce from the generalized terms of *TRAC*'s holding that it was meant to preclude District Court review in all circumstances of any case involving an agency which would have "an effect" on appellate jurisdiction. Otherwise, because of the necessary overlap of federal claims and federal agencies, *TRAC* would cut a swath through this Court's jurisdiction akin to Sherman's march through Georgia.

Ticor Title Ins. Co. v. FTC, 625 F. Supp. 747, 750 (D.D.C. 1986) (considering a request for injunctive relief based upon a constitutional challenge to the FTC's enabling statute), *aff'd in part and vacated in part*, 814 F.2d 731 (D.C. Cir. 1987).

The policy reasons relied on by the court of appeals in this case do not warrant the court's expansion of its exclusive jurisdiction beyond the clear language of Section 11 of the Clayton Act. In *Harrison*, this Court expressly rejected a plea that policy reasons require a construction of an exclusive review statute that is different from its plain terms. *Harrison*, 446 U.S. at 592-93. The Court stated:

> This is an argument to be addressed to Congress, not to this Court. It is not our task to determine which would be the ideal forum for judicial review of the Administrator's decision in this case. Rather, we must determine what Congress intended when it vested the courts of appeals with jurisdiction under [42 U.S.C. § 7607(b)(1) (1988)] to review "any other final action." The language of the statute clearly provides that a decision of the sort at issue here is reviewable in a court of appeals, and nothing in the legislative history points to any different conclusion.

446 U.S. at 593 (citation and footnote omitted). Simply stated, Congress, not the court of appeals, is the appropriate body to weigh the policies inherent in the balance of judicial power. The

task of the courts simply is to enforce the will of Congress, as it has been expressed in the statutes. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 746 (1985).

Ukiah alleged in its complaint that the full Commission's decision reversing Judge Parker was final agency action and that Ukiah had exhausted its administrative remedies on the threshold question of the FTC's jurisdiction. Nonetheless, the district court and the court of appeals concluded that, under the D.C. Circuit's *TRAC* doctrine, the Court of Appeals for the Ninth Circuit had *exclusive* jurisdiction to consider any action concerning the FTC's proceeding. (App. A; C.) The courts below therefore determined that the district court was divested of jurisdiction to hear Ukiah's action for injunctive relief. (App. c-2.) After five years of proceedings and two years after the agency's final action on the issue of its own jurisdiction, no court has yet addressed the substantive question of the FTC's jurisdiction.

B. The D.C. Circuit's *TRAC* Doctrine Requires Review.

In *TRAC*, the petitioners sought a writ of mandamus from the court of appeals to compel the Federal Communications Commission to decide matters pending before it. *TRAC*, 750 F.2d at 72. Although the parties did not raise the question, the court of appeals requested briefing on the issue whether the court of appeals had jurisdiction to hear the writ and, if so, whether that jurisdiction is exclusive or concurrent with that of the district courts. *Id.* at 74 n.22. In resolving this issue, the court of appeals in *TRAC* held that "where a statute commits final agency action to review by the Court of Appeals, the appellate court has exclusive jurisdiction to hear suits seeking relief that might affect its future statutory power of review." *Id.* at 72. In the case of Ukiah, by focusing on the expansive language of *TRAC* rather than on the exclusive review provisions of Section 11, the D.C. Circuit eviscerates the federal question jurisdiction of the district courts.

The expansive provisions for appellate review of FCC orders were critical to the *TRAC* court's holding. Section 2342(1) provides that:

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of --
>
> (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47.

28 U.S.C. § 2342(1) (1988). Section 402(a), in turn, makes reviewable "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the [Federal Communications] Commission." 47 U.S.C. § 402(a) (1988). By contrast, Section 11 of the Clayton Act vests the courts of appeals with exclusive jurisdiction over only a single category of FTC orders -- orders to cease and desist. 15 U.S.C. § 21(d). The difference could not be plainer.[10]

The court of appeals ignores its own precedent. In *Cutler v. Hayes*, 818 F.2d 879, 887 n.61 (D.C. Cir. 1987), the D.C. Circuit *sua sponte* clarified that *TRAC* is to be applied with fidelity to the terms of the statutory grant of jurisdiction in question: "Essential to our holding [in *TRAC*] were statutory provisions enabling us to review any final FCC order." After examining the exclusive appellate review provisions of the Food, Drug, and Cosmetic Act,

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[10] Statutes governing appellate review of administrative agency action vary widely in the breadth and specificity of the language employed. *See, e.g.*, 15 U.S.C. § 1710(a) (1988) (review of "an order or determination" of the Secretary of Housing and Urban Development in court of appeals); 16 U.S.C. § 839f(e)(5) (1988) (suits to "challenge the constitutionality" of Pacific Northwest Electric Power Planning and Conservation Act shall be filed in the United States court of appeals for the region); 28 U.S.C. § 2342(4) (exclusive jurisdiction in courts of appeals to review "all final orders of the Atomic Energy Commission"); 28 U.S.C. § 2342(5) (exclusive jurisdiction in the courts of appeals to review "all rules, regulations, or final orders of the Interstate Commerce Commission").

the court concluded that because "no statute commits direct review of FDA new drug regulations to this court, *TRAC* does not apply, and the District Court properly exercised jurisdiction." *Id.*; *see also Association for Regulatory Reform v. Pierce*, 670 F. Supp. 1041, 1045-46 (D.D.C. 1987) (reviewing exclusive review statutes under the Manufactured Housing Act and holding that district court has federal question jurisdiction), *aff'd in part and vacated in part*, 849 F.2d 649 (D.C. Cir. 1988). The court of appeals in this case ignored the holding of *Cutler* and the language of Section 11 of the Clayton Act.[11]

TRAC has left a confused and bitter legacy. Courts have struggled with the broad command of *TRAC* that "any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals." *TRAC*, 750 F.2d at 75. In *Ticor Title*, Judge Hogan cautioned that literal interpretation of *TRAC* would "strain credulity." 625 F. Supp. at 750; *see also In re Checkosky*, 142 F.R.D. 4, 6-7 (D.D.C. 1992) (stating that the expansive language of *TRAC* would deprive district courts of authority "even to enforce subpoenas in most agency matters"). The broad language of *TRAC* has produced disparate results in the lower courts. For example, in *Ticor Title*, 625 F. Supp. at 749, Judge Hogan held that *TRAC* does not preclude federal court jurisdiction to hear a constitutional challenge to the FTC's enabling legislation. In *Time Warner Entertainment Co. v. FCC*, 810 F. Supp. 1302, 1303-04 (D.D.C. 1992), Judge Jackson held that *TRAC* does not preclude a district court challenge

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[11] Of the few appellate courts to have cited *TRAC*, *none* have adopted the extreme interpretation of *TRAC* advanced by the court of appeals. In *Public Utility Commissioner v. Bonneville Power Administration*, 767 F.2d 622, 626-27 (9th Cir. 1985), for example, the court held that a provision expressly providing for review, albeit not exclusive, in the courts of appeals, over constitutional challenges to agency action, vested the courts of appeals with exclusive jurisdiction over a constitutional challenge to agency proceedings. *Bonneville Power* merely applies the proposition relied upon by the *TRAC* court in the proper context -- a specific review provision even if not exclusive will be deemed to be so for the kinds of cases specifically enumerated.

to the constitutionality of the FCC's enabling act. In *Checkosky*, 142 F.R.D. at 6-7, Judge Oberdorfer held that *TRAC* does not preclude district court jurisdiction over a petition to perpetuate testimony in agency proceedings. In contrast, in *Jamison v. FTC*, 628 F. Supp. 1548, 1550-51 (D.D.C. 1986), Judge Gasch held that *TRAC* precludes district court jurisdiction to hear a constitutional challenge to the FTC's enabling statute. In *Seminole Pipeline Co. v. Vogt*, 794 F. Supp. 438, 440 (D.D.C. 1992), Judge Richey held that *TRAC* precludes district court jurisdiction to hear a constitutional challenge to agency rules. In *Boozer v. United States*, C.A. No. 88-2867-LFO (D.D.C. Oct. 31, 1988), Judge Oberdorfer held that *TRAC* precludes district court jurisdiction to hear an action to enjoin subpoenas issued by the agency based on a claim of privilege.

The policies relied on by the court in *TRAC* are not relevant in this case. Judge Green, in *Ticor Title Insurance Co. v. FTC*, 814 F.2d 731 (D.C. Cir. 1987), summarized the limited relevance of the *TRAC* court's policy reasons in the context of purely legal challenges to agency action rather than intervention in ongoing agency process:

> The *TRAC* court's concern for duplicative and potentially conflicting judicial review, while perhaps compelling in cases that implicate the merits of ongoing agency proceedings, is relatively insubstantial in a case such as this, which involves a purely legal question. Indeed, the same duplication, risk of conflict, delay, and expense are present in all cases decided in the lower courts on motions for summary judgment, yet this has not been deemed a sufficient reason to vest exclusive jurisdiction over such cases in the court of appeals.

814 F.2d at 758 (Green, J., concurring). *TRAC* must be applied with fidelity to the statutory grant of exclusive jurisdiction and with a careful appreciation of the policies that *TRAC* advances. The court of appeals' "one size fits all" application of *TRAC*

threatens to swallow the federal question jurisdiction of district courts to hear issues concerning agency action.[12]

C. The Opinion Of The Court Of Appeals Conflicts With This Court's Prior Interpretations Of 28 U.S.C. §§ 1331 And 1337.

In *Leedom v. Kyne*, 358 U.S. 184, 189 (1958), this Court held that district courts have original jurisdiction over suits brought to terminate or strike down agency action that is in excess of the agency's delegated powers. By holding that the district court had no subject matter jurisdiction to consider Ukiah's action for injunctive relief based upon an uncompromising application of its *TRAC* doctrine, the D.C. Circuit has emasculated the original jurisdiction of the district courts to enjoin agency action beyond the scope of statutory authorization. By ousting the district courts of jurisdiction to correct *ultra vires* agency action, the decision judicially overturns the plain congressional command that the district courts shall have subject matter jurisdiction over "all actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. The opinion of the court of appeals conflicts directly with this Court's decision in *Leedom v. Kyne*, and with earlier opinions of the D.C. Circuit and other courts of appeals. *See, e.g., Railway Labor Executives' Ass'n v. National Mediation Bd.*, 988 F.2d 133, 137 (D.C. Cir. 1993); *Elmo Division of Drive-X Co. v. Dixon*, 348 F.2d 342, 345 (D.C. Cir. 1965); *Southern Ry. Co. v. American Train Dispatchers Ass'n*, 948 F.2d 887, 894 (4th Cir. 1991), *cert. denied*, 112 S. Ct.

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[12] The court of appeals' concern that an exception to *TRAC* would create an "endless stream of suits . . . seeking to stall or foreclose agency actions" (App. a-13-14), is misplaced. The court's extreme application of *TRAC* would merely shift suits from the district courts to the courts of appeals based on the *TRAC* doctrine's dubious jurisdictional grounds. Prudential doctrines such as ripeness, exhaustion, finality and standing have served the district courts well in securing the floodgates against the tide of litigation arising from agency action. As explained above, the FTC's ruling reversing Judge Parker is final agency action ripe for review. *See supra* n.9 at 12-13.

1762 (1992); *Champion Int'l Corp. v. EPA*, 850 F.2d 182, 185-86 (4th Cir. 1988); *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1209 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977); *Jewel Cos., Inc. v. FTC*, 432 F.2d 1155, 1160 (7th Cir. 1970); *Friends of the Crystal River v. EPA*, 794 F. Supp 674, 685-87 (W.D. Mich. 1992).

In *Leedom v. Kyne*, this Court held that a district court, under 28 U.S.C. § 1337,[13] may enjoin a federal agency acting in excess of its statutory or constitutional authority. Contrary to the express language contained in Section 9(b)(1) of the National Labor Relations Act, 29 U.S.C. § 159(b)(1) (1988), the National Labor Relations Board in *Leedom v. Kyne* certified a mixed professional/nonprofessional bargaining unit. 358 U.S. at 185. A group representing professional employees filed suit in district court alleging that the Board had exceeded its statutory power and praying that the Board's action be set aside. *Id.* at 186. The district court denied the Board's motion to dismiss for lack of jurisdiction, and this Court affirmed. This Court held "that the District Court had jurisdiction of [the] suit." *Id.* at 191.[14] This Court rejected the Board's attempt to characterize the suit as an effort to "review" agency action:

> This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order

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[13] Section 1337 confers original jurisdiction on the district courts over "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 28 U.S.C. § 1337(a). Ukiah alleged jurisdiction in the district court under Sections 1331 and 1337.

[14] The Board urged that Section 10(c) of the Act, which vested the courts of appeals with exclusive jurisdiction to review final orders of the Board, stripped the district courts of their original jurisdiction under Section 1337. *Leedom v. Kyne*, 358 U.S. at 187.

> of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act.

358 U.S. at 188.[15]

It is Ukiah's position in this case that the FTC has "attempted [to] exercise [a] power that ha[s] been specifically withheld," as did the NLRB in *Leedom v. Kyne*, 358 U.S. at 189. Ukiah contends that the FTC has ignored the clear terms of Section 7 of the Clayton Act, which confer no jurisdiction on the FTC to investigate, prosecute, or otherwise regulate the Ukiah transaction, an assets acquisition by a not-for-profit hospital. *See infra* at 23-26. Administrative Law Judge Parker agreed with this contention. (App. D, E.) The district court clearly had jurisdiction under Sections 1331 and 1337 to make the threshold determination whether or not the FTC has exceeded its statutory mandate. *Champion Int'l*, 850 F.2d at 185-86. Rather than considering the merits of Ukiah's serious challenge to the agency's jurisdiction, the district court transferred the action for injunctive relief to the Ninth Circuit, based upon *TRAC*.[16] To the extent that the D.C. Circuit's *TRAC* doctrine required this result, it has done violence

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[15] As in *Leedom v. Kyne*, in this case the appellate mechanisms are inadequate to vindicate Ukiah's rights. *See Leedom v. Kyne*, 358 U.S. at 190. Ukiah, as a not-for-profit institution, is exempt from antitrust regulation under Section 7 of the Clayton Act. *See infra* at 23-26. Review from a final decision on the merits will be neither meaningful nor adequate. *See Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985) (denial of motion to dismiss immediately appealable when motion to dismiss grounded on claim of qualified immunity from suit). *Board of Governors v. MCorp. Financial, Inc.*, 112 S. Ct. 459, 466 (1991), is different. In *MCorp*, the statute specifically precluded any court from exercising jurisdiction over any action to enjoin orders or notices. *See* 12 U.S.C. § 1818(i)(1) (1988).

[16] The anomalous result of the transfer order is that the Ninth Circuit Court of Appeals now has before it Ukiah's injunction action. Because the district court had jurisdiction, the transfer order was clearly erroneous. *See* 28 U.S.C. § 1631 (transfer upon finding of want of jurisdiction). The transfer order also should have been appealable under the concurrent jurisdiction exception of *Goble v. Marsh*, 684 F.2d 12 (D.C. Cir. 1982). (App. a-6-7.)

to the federal question jurisdiction of the district courts under Sections 1331 and 1337.

II.
The FTC Has No Jurisdiction Over The Ukiah Transaction Under Section 7 Of The Clayton Act.

Section 7 of the Clayton Act confers no jurisdiction on the FTC to investigate or prosecute the Ukiah assets acquisition. Ukiah's objection to the FTC's exercise of jurisdiction over the Ukiah transaction raises a serious question of subject matter jurisdiction which the agency's own Administrative Law Judge ruled warranted dismissal and as to which courts in the Fourth, Seventh, and Eleventh Circuits recently have split.[17] The question deserves early and serious judicial review.

The question of the FTC's jurisdiction over the Ukiah transaction, like the other jurisdictional questions presented, may be resolved by reference to the plain terms of the jurisdictional grant. *See Community for Creative Non-Violence v. Reid*, 490

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[17] Prior to the full Commission's decision in Ukiah's case, four tribunals addressed the issue of the FTC's jurisdiction under the Clayton Act over assets acquisitions by not-for-profit entities. The results are conflicting. The district court in *United States v. Carilion Health System*, No. 88-0249-R, slip op. at 3-6 (W.D. Va. Sept. 30, 1988), dismissed the Justice Department's Section 7 count, concluding that the government had no jurisdiction under Section 7 to prosecute an assets acquisition by a not-for-profit entity. The court reaffirmed its holding in a later decision that found no Sherman Act violation. *United States v. Carilion Health System*, 707 F. Supp. 840, 841 n.1 (W.D. Va.), *aff'd without op.*, 892 F.2d 1042 (4th Cir. 1989). Judge Parker in the proceedings below also concluded that the FTC lacked jurisdiction under Section 7. (App. E.). In a discussion that the FTC concedes is dicta (App. f-37), the Seventh Circuit suggested that the Department of Justice has jurisdiction under Section 7 of the Clayton Act over an assets acquisition by a not-for-profit entity. *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1280-81 (7th Cir.), *cert. denied*, 498 U.S. 920 (1990). The Eleventh Circuit, in *FTC v. University Health, Inc.*, 938 F.2d 1206, 1217 (11th Cir. 1991), allied with the Seventh Circuit and held that the FTC has jurisdiction under the Clayton Act.

U.S. 730, 739 (1989); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979).

Section 7 of the Clayton Act states:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the *stock or other share capital* and no person *subject to the jurisdiction of the Federal Trade Commission* shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18 (emphasis added).

Section 7 has two express jurisdictional prongs which reach: (1) acquisitions of stock or other share capital; and (2) pursuant to the 1950 Amendments, acquisitions of assets by persons subject to the jurisdiction of the Federal Trade Commission. By its express terms, Section 7 does not apply to the Ukiah transaction.

The first prong of Section 7 reaches acquisitions of "stock or other share capital." It does not apply in this case because Ukiah, as a not-for-profit, does not issue stock and did not acquire any stock or other share capital. (App. e-6.) Moreover, courts already have rejected any strained attempt to interpret the terms "stock or other share capital" to mean any form of control. *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1281 (7th Cir.), *cert. denied*, 498 U.S. 920 (1990); *United States v. Carilion Health System*, No. 88-0249-R, slip op. at 3-6 (W.D. Va. Sept. 30, 1988), *aff'd on other grounds without op.*, 892 F.2d 1042 (4th Cir. 1989).

The second jurisdictional prong of Section 7 reaches assets acquisitions by persons "subject to the jurisdiction of the [FTC]." It does not apply in this case because Ukiah Valley and Adventist Health System/West are not persons subject to the jurisdiction of the FTC.[18] The FTC's jurisdiction never has included not-for-profit entities.[19] Under Section 4 of the FTC Act, Congress granted the FTC authority to regulate "any company . . . or association, incorporated or unincorporated, which is organized to carry on business *for its own profit or that of its members*." 15 U.S.C. § 44 (emphasis added). Ukiah Valley and Adventist Health System/West are non-stock charitable entities which do not operate for their own profit or for the profit of any member. Neither, therefore, is subject to the jurisdiction of the FTC.

This Court in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), made it clear that the "subject to the jurisdiction of the [FTC]" provision in Section 7 is to be interpreted by reference to the FTC Act:

> By its terms, the present § 7 reaches acquisitions of corporate stock or share capital by any corporation

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[18] The FTC relies heavily upon the definition of "person" under the Clayton Act, 15 U.S.C. § 12(a) (1988). However, the plain language of Section 7 of the Clayton Act requires covered "persons" to be "subject to the jurisdiction of the [FTC]". 15 U.S.C. § 18.

[19] *See Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1020-22 (8th Cir. 1969); *In re Ohio Christian College*, 80 F.T.C. 815, 847-49 (1972). The FTC's recent interest in assets acquisitions by not-for-profits is an unvarnished effort to expand its jurisdiction beyond statutory confines that the FTC has recognized in the past. *See Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H.R. 3816 Before the Subcommittee on Consumer Protection and Finance of the House of Representatives Committee on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. (1977) (statement of Hon. Calvin J. Collier, Chairman, FTC); *Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House of Representatives Committee on Energy and Commerce*, 101st Cong., 1st Sess. (1989) (statement of William C. McLeod, Director of the FTC's Bureau of Consumer Protection).

> engaged in commerce, *but it reaches acquisitions of corporate assets only by corporations "subject to the jurisdiction of the Federal Trade Commission." The FTC, under § 5 of the Federal Trade Commission Act, has no jurisdiction over banks. 15 U.S.C. § 45 (a)(6). Therefore, if the proposed merger be deemed an assets acquisition, it is not within § 7.*

Id. at 335-36 (emphasis added) (footnotes omitted). The Court reiterated this point when it noted that:

> Nothing in this opinion, of course, limits the power of the FTC, under §§ 7 and 11 . . . *where the acquiring corporation is subject to the FTC's jurisdiction*, see 15 U.S.C. § 45(a)(6). . . .

Id. at 345 n.22 (emphasis added). Clearly, the FTC Act is the reference point for interpreting Section 7, as expressly dictated by this Court. The FTC has no jurisdiction to investigate, prosecute, or otherwise exercise jurisdiction over the underlying assets acquisition by a not-for-profit entity.

III.

The Court Of Appeals Erred In Dismissing Ukiah's Appeal From The District Court's Denial Of Ukiah's Motion For A Preliminary Injunction.

Section 1292(a)(1) provides that the courts of appeals "*shall have* jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions." 28 U.S.C. § 1292(a)(1) (emphasis added). In no uncertain terms, the district court denied Ukiah's motion for preliminary injunction.

> Thus, it hereby is ORDERED, that the plaintiffs' motion for a preliminary injunction is denied.

(App. c-2.) The court of appeals ignored the district court's order denying Ukiah's motion for a preliminary injunction, and held that Section 1292(a)(1) "does not provide a jurisdictional basis for reviewing the *transfer* order." (App. a-7 (emphasis added).)[20]

That order was immediately appealable as of right to the court of appeals. *EEOC v. Kerrville Bus Co., Inc.*, 925 F.2d 129, 132 (5th Cir. 1991) (if the order "specifically denies an injunction, then under § 1292(a)(1) that order is appealable as of right, right away"). As the court of appeals recognized, the merits of the preliminary injunction and the transfer order involve independent issues. (App. a-8.) The right to appeal the order denying the preliminary injunction under Section 1292(a)(1) is unaffected by the transfer order. The court of appeals clearly erred by failing to heed the mandate of Section 1292(a)(1).[21]

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[20] The court of appeals relied exclusively on *Raines v. Block*, 798 F.2d 377 (10th Cir. 1986). Unlike this case, however, the district court in *Raines* did not dismiss the plaintiff's claims for injunctive relief. *See Raines v. Block*, 599 F. Supp. 196, 199 (D. Colo. 1984).

[21] Moreover, this Court has held that appellate jurisdiction extends to "*orders that have the practical effect* of granting or denying injunctions and have 'serious, perhaps irreparable, consequence.'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287-88 (1988) (emphasis added) (quoting *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981)); *I.A.M. Pension Fund v. Cooper Indus., Inc.*, 789 F.2d 21, 24 (D.C. Cir.), *cert. denied*, 479 U.S. 971 (1986). Because the court of appeals in this case affirmed the order transferring the preliminary injunction action to the Ninth Circuit Court of Appeals, rather than remanding to the district court to hear the merits of the injunctive action, the transfer order indeed had the practical effect of denying the injunction with irreparable consequences.

CONCLUSION

For all of the foregoing reasons, Ukiah respectfully requests that this Court reverse the order of the United States Court of Appeals for the District of Columbia Circuit and remand with instructions to remand to the district court for hearing of Ukiah's motion for preliminary injunction. In the alternative, Ukiah requests that this Court consider the question of the FTC's jurisdiction over the Ukiah transaction on the merits, and enjoin the FTC proceeding on the ground that it is beyond the FTC's statutory mandate.

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